STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW JAMES TROMBLEY,

Defendant-Appellant.

UNPUBLISHED
June 13, 1997

No. 172541
Macomb Circuit Court
LC No. 92-002226-FC

Before: Doctoroff, P.J., and Michael J. Kelly and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, in connection with the death of ten-year-old Deanna Seifert. He was sentenced to forty to sixty years' imprisonment. Defendant now appeals as of right. We affirm defendant's conviction and sentence.

Deanna Seifert lived with her parents and two brothers on Essex Street in Warren. On May 9, 1992, a friend of Deanna's introduced her to Lindsey McCracken. Lindsey McCracken also lived on Essex Street with her mother, Denise McCracken ("McCracken"), her siblings, and Lori Menzo, defendant's former girlfriend. The Essex Street house had been rented for McCracken and her children by Don Crickon[1], Lindsey's father. Don Crickon initially lived at the Essex Street residence with Denise McCracken and her children, but at the time of the incident in question was serving ninety days in jail for a parole violation. Defendant had also been living at the Essex Street house but had moved out eight days prior to the incident in question. On May 9, 1992, defendant was living with his mother in her apartment above the Hitching Post Bar. Although defendant no longer lived at the McCracken residence, evidence presented at trial indicated that he retained a key to the residence.

After meeting Deanna, Lindsay invited her to spend the night at the McCracken residence. The girls went to bed at approximately 11:00 p.m. or midnight. Lindsay and Deanna slept in Menzo's bedroom at the rear of the house.[2] McCracken went to bed at approximately 1:00 a.m. Before going

to bed, McCracken locked the front and back doors. The next morning, it was discovered that Deanna was gone, her change of clothes left behind.[3]

Adeline Mary Deittrick, who lived near the McCracken home on Essex Street, testified at trial that she had come downstairs at approximately 3:00 a.m. and, as she walked by the front door, she saw defendant's van[4] parked in front of the McCracken residence. Deittrick had seen defendant's van many times, and had seen both defendant and a shorter, stockier man drive it. Deittrick testified that she then saw "a man coming out of the yard carrying a girl. It looked like [defendant] but [she] didn't see his face." The man was running as though the girl was heavy. He put the child down next to the van and fumbled, trying to get the driver's door open. The man then carried the child to the back of the van, put her down again, opened the rear door and "[e]ither tossed her to somebody or threw her in." He then got into the rear of the van and closed the door. About thirty seconds later "somebody got in the driver's seat and took off" fast, without turning on the headlights. Deittrick did not actually see anyone else inside the van. Deittrick testified that she thought the man she had seen was defendant. However, Deittrick admitted that, when she first spoke to police, she did not tell them that she thought she knew the identity of the man who had taken the girl.

Another neighbor on Essex Street, David Leija, testified that he saw defendant's van parked in front of the McCracken residence at approximately 12:45 a.m. Leija had seen the van on numerous occasions and testified that defendant normally drove the van.

A van matching the description of defendant's van was observed by John Sliwa at approximately 2:30 or 3:00 a.m. Sliwa's house is located near the Hitching Post Bar. Sliwa looked out his window when he heard the sound of glass breaking. He observed three men walking down the middle of the street ahead of a gray primer Chevy or GM van. The van stopped in front of Sliwa's house. A woman approached the passenger side of the van and began speaking with the occupant or occupants of the van. Sliwa could not see the driver of the van. Moreover, Sliwa could not distinguish the faces of the woman or the three men and therefore could not identify them. As the woman leaned in the passenger side of the van, one of the men outside the van said "are you coming to help us do this, bitch? If not, get your fucking ass back home." The woman then walked away and the men proceeded to walk north about two blocks, then got in the van and drove away. Sliwa claimed to recognize the van he saw as defendant's from having seen it drive by his house many times and from seeing it at the Hitching Post Bar.[5]

Donna Sherman testified that at approximately 3:30 or 4:00 a.m. on the night in question she saw an old, beat-up gray primer van matching the description of defendant's van come out of the rear entrance of the Hitching Post Bar parking lot and go east on Rivard at an excessive rate of speed. Sherman was getting out of a cab in front of her parents' house[6] when the cab was almost side-swiped by the gray van. According to Sherman, there were two white males with long hair inside the van. Although she had never seen him before, Sherman identified defendant as the driver of the van.[7] Sherman testified that she had seen the van parked in the Hitching Post Bar parking lot during the two-week period prior to the incident in question.

Sherman's sister, Tammy Bowers, leaned out the front door of her parents' house as Sherman was exiting the cab. Bowers saw a van come out of the rear of the Hitching Post Bar parking lot and go east on Rivard. There were two people inside the van. The van almost hit the cab. Bowers testified that the van was a dirty, dull gray, that it was rusty, and that it had a loud exhaust system. She identified a picture of defendant's van as the one she saw that night. Bowers testified that she had seen the van many times parked at the Hitching Post Bar.

The cab driver, Ray Zander, testified that on the night of the incident in question his cab was almost hit by an old, gray primer Chevy or Ford van. At trial, Zander identified defendant as the driver of the van.[8] Zander indicated that, as the van drove by, defendant was laughing and turning his head as though he was talking to someone on the passenger side of the van.

John R. Williams, a security guard, testified that he was working at American Chain & Conveyor Co. ("ACCO"), located on Blackstone Street just north of Nine Mile Road, on the night of the incident in question. Williams was stationed inside a guard shack outfitted with triple-black glass windows, so he could see out but no one could see in. At approximately 2:00 a.m., Williams observed a light colored van with only one headlight turn north on Blackstone from Nine Mile Road. The van drove back and forth down Blackstone Road, eventually parking in front of a building across the street from ACCO. Williams subsequently left the guard shack and when he returned from his rounds, the van was gone. Deanna's body was eventually found inside a bin in the parking lot behind the building where the van had been parked. When Williams was contacted by police, he could not identify pictures of defendant's van and Williams conceded that he may have told police that he saw a dark van, not a light colored van.

Defendant was arrested on May 10, 1992, ostensibly for driving without a license.

On July 13, 1992, Deanna's body was found inside a metal bind located in a parking lot behind a machine shop, less than a mile away from the McCracken residence. Deanna's body was clad in the nightgown she had been wearing at the sleep-over. However, her underwear was on inside out. It was later determined that Deanna had died of a severe blow to the head inflicted with a blunt heavy object. A piece of a cement step found in the parking lot may have been the murder weapon. Human blood was discovered in the area of the parking lot where Deanna's body was found.[9] The time of death was estimated as roughly coincidental with her disappearance. At trial, the pathologist opined that Deanna's body had probably been inside the bin all along.[10]

Three pubic hairs were recovered from Deanna's underwear. Expert testimony established that the pubic hairs probably came from three different Caucasian individuals of unknown sex. It was determined that defendant could not have been the source of any of the hairs found on the body.

The parking lot area where Deanna's body was found was littered with metal chips or shavings generated by the metal shops located around it. Four similar looking shavings were found embedded in the rear tires of defendant's van. Metal chip samples were then collected from the parking lot and from one of the businesses bordering it. The chemical composition of the chips was then analyzed and

compared. Expert witness testimony established that at least one of the chips found in the tires was indistinguishable from one of the chips found in the parking lot. However, testimony was also presented to indicate that these chips littered the roads around the Hitching Post Bar and could be embedded in the tires of cars that drove over those roads.

Small amounts of dried blood was found in the toe and heel area of the black tennis shoes defendant was wearing when he was arrested. These shoes had been given to defendant by Don Crickon approximately one month before the incident in question. However, the blood on the shoes was not immediately discovered or preserved and therefore, by the time it was tested, the sample was so degraded that DNA testing could not be done. Nevertheless, the blood tested positive for A and B antigens and 1+ for the "PGM" enzyme. Deanna's blood type was AB, PGM 1+.[11] Hence, expert testimony established that the blood found on defendant's shoe was consistent with Deanna's blood. It was conceded, however, that the donor of the sample could not be positively identified by these tests alone.

Thirty-nine fibers found on Deanna's nightgown matched the fibers of the inside lining of a jogging jacket found among defendant's belongings at his mother's apartment. The prosecution's expert concluded that it was very likely that there had been direct contact between the nightgown and the inside lining of defendant's jacket or a very similar jacket. However, the expert acknowledged that he was not told that two people at the McCracken residence allegedly regularly wore defendant's jogging jackets and conceded that it was possible, although unlikely, that the lining fibers from the jackets may have been deposited on the furniture in the McCracken residence and later picked up by Deanna's nightgown. A large number of black cotton, black polyester, blue cotton, and blue polyester fibers were also found on the nightgown which did not match any of defendant's clothing and whose source was never identified.

Significantly, four fingerprints later identified as Deanna's were found on the inside of the rear passenger side porthole window of defendant's van.[12]

Defendant theorized below that this matter involved a case of mistaken identity. Defendant presented evidence in support of this theory at trial.[13] Defendant also presented an alibi defense. Defendant testified that during the evening hours of May 9, 1992, he attended a birthday party at the Hitching Post Bar. He arrived at the party at 7:30 or 8:00 p.m. Defendant testified that he drank a large amount of alcohol during the party. He indicated that he vaguely recalled crawling upstairs to his mother's apartment at about 2:00 or 2:15 a.m. and that he then went to sleep. Other witnesses confirmed that defendant attended the birthday party at the Hitching Post Bar and that he had quite a bit to drink that evening. Some of the witnesses indicated that defendant was intoxicated. Sandra Lynn Miller testified that she walked out of the bar with defendant at 2:15 a.m. She helped defendant walk to the stairs leading to his mother's apartment and then watched him as he crawled up the stairs. However, Christine Kahl testified that defendant had left the party by 1:30 a.m. and that his van was not in the parking lot when she left the bar at 2:15 a.m. Kahl also testified that defendant did not seem intoxicated. Defendant's mother, Joyce Crickon, testified that defendant came up to her apartment at approximately 2:30 a.m. and told her that he was really "loaded." Crickon claimed she sat up all night

reading in the living room because of a fight with her live-in boyfriend. She testified that defendant was asleep on the couch the entire night.

I.

Defendant first claims that the trial court abused its discretion in denying defendant's motion for a new trial, which was based on defendant's claim that the verdict was against the great weight of the evidence, without evaluating the whole body of proofs and the credibility of the prosecution's witnesses. We disagree.

Unlike a motion for directed verdict, which is resolved by examining the sufficiency of the evidence in the light most favorable to the prosecution, "a new trial may be granted where the verdict is against the great weight of the evidence." *People v Herbert*, 444 Mich 466, 474-475; 511 NW2d 654 (1993).[14] Where, as here, a defendant moves for new trial on the ground that the verdict was contrary to the great weight of the evidence, the judge is to act "'as the thirteenth juror,' *i.e.*, he evaluates the credibility of the orally-testifying witnesses and therefore their demeanor." *Id.* at 476. The exercise of this judicial power is to be undertaken with "great caution, mindful of the special role accorded jurors under our constitutional system of justice." *Id.* at 477. A trial judge may not take away the jury's right of judgment, and can only set aside a verdict if it is "perverse." *Id.* at 476. However, a judge may grant a new trial after finding the testimony of witnesses for the prevailing party not to be credible. *Id.* In such a case, the trial court is essentially finding that the verdict was against the great weight of the evidence. *Id.*

The court must make an oral or written record of its ruling, MCR 6.431(B), and this Court reviews that decision for an abuse of discretion. *Id.* at 477. In this case, the trial judge stated the following in considering defendant's motion for a new trial:

> There was sufficient evidence to submit the charge of second-degree murder to the jury. There was evidence Deanna S[ei]fert was taken to the crime scene in defendant's van. Expert testimony connected fibers from one of defendant's jackets [to] the fibers found on Deanna Seifert's nightgown. Blood matching Deanna S[ei]fert's blood type was found on defendant's shoe. While there were some conflicts in the testimony, the credibility and weight to be given to the testimony is within the province of the jury. *People v Johnson*, 128 Mich App 618, 623; 341 NW2d 160 (1983). The jury's verdict was not against the great weight of the evidence.

Although the trial court did not use the specific language set forth in *Herbert*, it is clear that the trial court did not find the jury verdict "perverse" or against the great weight of the evidence. Unlike the situation in *Herbert*, the trial court in this case did not fail to recognize its ability to consider the credibility of the witnesses. Instead, the trial court properly found that the verdict was supported by the evidence presented and that the jury's determination of the witnesses' credibility was not improper. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion for a new trial.

II.

Defendant next claims that the trial court reversibly erred in allowing the admission of hearsay testimony.

At trial, John Sliwa testified that he observed a van matching the description of defendant's van at approximately 2:30 or 3:00 a.m. on the night of the incident in question. Sliwa's house is located near the Hitching Post Bar. Sliwa testified that he looked out his window when he heard the sound of glass breaking. He observed three men walking down the middle of the street ahead of a gray primer van. The van stopped in front of Sliwa's house. A woman approached the passenger side of the van and began speaking with the occupant or occupants of the van. Sliwa could not see the driver of the van. Moreover, Sliwa could not distinguish the faces of the woman or the three men and therefore could not identify them. As the woman leaned in the passenger side of the van, one of the men outside the van said "are you coming to help us do this, bitch? If not, get your fucking ass back home." Defense counsel objected to the admission of this statement on hearsay grounds. The trial court ruled that the statement overheard by Sliwa was admissible as a coconspirator's statement.

Statements of coconspirators are admissible and exempt from the definition of hearsay only where there is independent proof of the conspiracy. See MRE 801(d)(2)(E). See also *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520 (1994). A coconspirator's statement may be admitted conditionally under this rule "subject to later independent proof of the conspiracy." *Id.* Circumstantial evidence of an agreement is sufficient. *People v Vega*, 413 Mich 773, 780; 321 NW2d 675 (1982); *People v Cotton*, 191 Mich App 377, 392-394; 478 NW2d 681 (1991). We do not believe the statement was properly admitted.

After reviewing the record, however, we hold that even if there was error in the admission of Sliwa's testimony, the error was not decisive of the outcome. *People v Figgures*, 451 Mich 390, 402; 547 NW2d 673 (1996). Except for the hearsay words of the pedestrian, Sliwa's observations were properly admitted.

The evidence presented at trial indicated as follows. Adeline Mary Deittrick testified that at approximately 3:00 a.m., she saw defendant's van parked in front of the McCracken residence. She then saw "a man coming out of the yard carrying a girl." Deittrick thought the man was defendant. The man carried the child to the back of the van, opened the rear door and "[e]ither tossed her to somebody or threw her in." About thirty seconds later "somebody got in the driver's seat and took off" fast, without turning on the headlights. Defendant had one of the few keys to the residence and there was no sign of forced entry. The van in which the child was placed was positively identified as defendant's van by witnesses who had seen the van on numerous prior occasions. Donna Sherman, Tammy Bowers and Ray Zander testified, with some variations, that shortly after Deanna's abduction they saw a van that looked liked defendant's come out of the rear entrance to the Hitching Post Bar parking lot, speed down the street, and nearly strike the cab from which Sherman had just alighted. Sherman and Zander identified defendant as the driver of the van. Additionally, Sherman and Bowers testified that they saw two people inside the van. Zander testified that, as the van drove by, defendant

was laughing and turning his head as though he was talking to someone on the passenger side of the van. Deanna's body was eventually found inside a garbage bin in a parking lot less than a mile from the McCracken residence. A van similar to defendant's was seen at this location on the night Deanna was abducted and murdered. After Deanna's body was recovered, three pubic hairs were found on her underwear. Expert testimony established that the pubic hairs probably came from three different Caucasian individuals of unknown sex. It was determined that defendant could not have been the source of any of the hairs found on the body. However, blood found on defendant's shoe was consistent with Deanna's blood. Moreover, thirty-nine fibers found on Deanna's nightgown matched the fibers on the inside lining of a jogging jacket found among defendant's belongings at his mother's apartment. Expert testimony established that it was very likely that there had been direct contact between Deanna's nightgown and the inside lining of defendant's jacket. Most importantly, four fingerprints identified as Deanna's were found on the inside of the rear porthole window of defendant's van.

We are persuaded that any error in the presentation of the alleged hearsay testimony was not decisive to the outcome of this case. The meaning of the statement overheard by Sliwa was, at best, nebulous. The identity of the speaker, his companions, and their connection, if any, with defendant was never established by the prosecution. Further, Sliwa's credibility was seriously damaged during cross-examination (see, for example, footnote 5). Finally, the evidence properly admitted was sufficient to support defendant's conviction. For these reasons, we conclude that any error in the admission of Sliwa's testimony was harmless.

III.

Next, defendant claims that the trial court erred in permitting evidence and argument that defendant aided and abetted first-degree felony murder because the evidence failed to establish or prove the existence, identity, or guilt of a principal. We disagree. It is well-settled that the "conviction of a principal is not necessary for the conviction of a party aiding and abetting." *People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992). See also *People v Genoa*, 188 Mich App 461, 464-464; 470 NW2d 447 (1991). However, in order to support an aiding and abetting conviction, the prosecutor must prove the guilt of the principal. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995); *Wilson, supra* at 609. As long as the guilt of the principal is shown, the principal's identity need not be proved. *People v Vaughn*, 186 Mich App 376, 381-383; 465 NW2d 365 (1990). The prosecution need only introduce sufficient evidence that the crime was committed and that defendant committed it or aided and abetted it. *Turner, supra* at 569; *In re McDaniel*, 186 Mich App 696, 699-700; 465 NW2d 51 (1991). In *Vaughn*, this Court, relying on *People v Brown*, 120 Mich App 765, 772; 328 NW2d 380 (1982), indicated that the rule prohibiting the conviction of a defendant as an accessory where no guilty principal has been shown only applies to those cases in which legally insufficient evidence is adduced to permit that conclusion that there was a guilty principal.

After hearing the evidence, the jury could have reasonably believed that more than one person was involved in Deanna's abduction and murder and that defendant's role amounted to something less than the direct bludgeoning and killing. Clearly, in our opinion, the evidence was sufficient to support a

finding that there was a guilty principal other than defendant even though the identity of that principal is still unknown. Contrary to defendant's claim, therefore, the trial court did not err in permitting evidence and argument that defendant aided and abetted first-degree felony murder.

Because the jury could have believed that more than one person was involved in Deanna's abduction and murder and that defendant's role in the crime may have amounted to something less than direct commission of the killing, defendant's claim that the jury instruction on aiding and abetting was not supported by the evidence must likewise fail. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995).

IV.

Next, defendant claims that the trial court erred in denying his motion for a directed verdict on the first-degree felony murder charge. We disagree.

To review a trial court's ruling with regard to a motion for a directed verdict, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

Defendant was charged with first-degree felony murder.[15] Felony murder is defined as a murder committed during the perpetration of, among other things, kidnapping. MCL 750.316; MSA 28.548. See also *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). Under the murder statute, proof of malice is required to convict a defendant of felony murder. *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). Thus, there must be sufficient evidence for the trier of fact to find that defendant "acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *Aaron, supra*, at 733.

To convict a defendant on an aiding and abetting theory, the prosecution would need to show that the crime charged was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and that the defendant either intended to commit the crime or knew that the principal intended to commit the crime at the time he gave aid or encouragement. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). The amount of aid or assistance given is immaterial as long as it had the effect of inducing or encouraging the crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Hart*, 161 Mich App 630, 635; 411 NW2d 803 (1987), (*After Remand)*, 170 Mich App 111; 427 NW2d 557 (1988); *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986).

Here, because the prosecution's theory was that defendant aided and abetted in the commission of felony murder, "[t]he requisite intent is that necessary to be convicted of the crime as a principal," that is, malice. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). "[I]t therefore must be

shown that the aider and abettor had the [specific] intent to kill, the intent to cause great bodily harm or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm." *Id.* If the aider and abettor participated in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, that would be sufficient to find that he acted with wanton and willful disregard sufficient to support a finding of malice. *Id.*, 278-279.

Thus, in this case, the prosecution was required to produce sufficient evidence that defendant performed acts or gave encouragement that aided or assisted in the commission of a kidnapping which resulted in murder, and that he either acted with malice as defined above, or with the knowledge that the principal intended to kill or cause great bodily harm.

We believe the evidence presented in this case was sufficient for a reasonable factfinder to conclude that all the elements of first-degree felony murder were established beyond a reasonable doubt. As we indicated above, it could be inferred from the evidence that defendant wilfully and without authority kidnapped Deanna and asported her somewhere. Defendant, or someone who looked like him, was seen carrying a child from the McCracken residence at approximately 3:00 a.m. He took the child and placed her in the rear of a van and sped away. The conclusion that it was defendant who was seen leaving the McCracken residence is bolstered by the fact that defendant had one of the few keys to the locked residence and there was no sign of forced entry. Moreover, the van in which the child was placed was positively identified as defendant's van by witnesses who had seen the van on numerous prior occasions. There was also evidence that defendant was seen with other men just before and right after the crime, that Deanna was killed shortly after she was kidnapped by a blow to the head possibly inflicted by a piece of cement step found in the parking lot where Deanna's body was discovered, that a van similar to defendant's was seen near the bin where Deanna's body was found on the night she was kidnapped and murdered, that blood found on defendant's shoes may have been Deanna's, that Deanna fingerprints were found in defendant's van, and that many fibers matching defendant's jacket were found on Deanna's nightgown. Further, three pubic hairs from three separate individuals were recovered from Deanna's underwear. It was determined that defendant could not have been the source of any of these pubic hairs.

The jury could have inferred from this evidence that defendant kidnapped Deanna and then turned her over to others to be raped and/or killed. Defendant's actions, at the very least, evince a wanton and willful disregard of the likelihood of the natural tendency of his behavior to result in death or great bodily harm to Deanna. Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to establish that defendant committed first-degree felony murder. Likewise, this evidence was sufficient to support a finding that defendant aided and abetted the commission of second-degree murder. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).

V.

Defendant next claims that the trial court erred in refusing to instruct the jury with amended versions of CJI2d 4.3 and CJI2d 3.2(3). We disagree. We review jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830

(1994). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*.

Here, even though the trial court refused to amend CJI2d 4.3, the circumstantial evidence instruction, to include language to the effect that if the evidence was susceptible to a construction indicating innocence the jury had a duty to acquit, this refusal does not constitute grounds for reversal because after reviewing the jury instructions in their entirety we conclude that the concept of circumstantial evidence was adequately presented to the jury. *Daniel, supra.* Moreover, the language requested by defendant has been criticized by this Court because it unfairly enhances the prosecution's burden of proof. See *People v Moore,* 176 Mich App 555, 557-565; 440 NW2d 67 (1989) (Hammond, J., concurring). Additionally, this Court has repeatedly held that "it is unnecessary for the prosecutor to negate every reasonable theory consistent with defendant's innocence." *People v Carson,* 189 Mich App 268, 269; 471 NW2d 655 (1991); *People v Hahn,* 183 Mich App 465, 470; 455 NW2d 310 (1989), modified 437 Mich 867 (1990); *People v Daniels,* 163 Mich App 703, 707; 415 NW2d 282 (1987). Rather, it is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. *Carson, supra; Hahn, supra; Daniels, supra.* Hence, defendant's amendatory language was inconsistent with the law in this state.

We also reject defendant's claim that the moral certainty language which had been part of former CJI 3:1:04 and CJI 3:1:05 should have been added to CJI2d 3.2, the instruction on, among other things, reasonable doubt. This Court has previously held that CJI2d 3.2 adequately presents the concept of reasonable doubt to the jury without the "moral certainty" language, *People v Sammons,* 191 Mich App 351, 372; 478 NW2d 901 (1991), cert den 505 US 1213; 112 S Ct 3015; 120 L Ed 2d 888 (1992); *People v Jackson,* 167 Mich App 388, 390-391; 421 NW2d 697 (1988), and that the failure to include the "moral certainty" language in the definition of reasonable doubt does not give rise to error warranting reversal. *People v Hubbard (After Remand),* 217 Mich App 459, 487; 552 NW2d 493 (1996); *Sammons, supra* at 372. Moreover, it was unnecessary to include the "moral certainty" language in the reasonable doubt jury instruction as a response to the prosecutor's comments to the media that his office was convicted of defendant's guilt to a moral certainty because the jurors indicated that they had not seen, read, or heard any media coverage during the trial.

VI.

Defendant next argues that his forty-year minimum sentence for second-degree murder is disproportionate under *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). We disagree. Defendant's forty- to sixty-year sentence exceeds the minimum guidelines range of ten to twenty-five years. In sentencing defendant to a minimum sentence in excess of the guidelines range, the trial court indicated that the following factors were not adequately addressed by the guidelines and justified a departure from the guidelines' recommended range: (1) the heinous nature of the crime (a ten-year-old girl abducted, perhaps raped, killed by a crushing blow to the head and left in a trash bin); (2) the

viciousness and unprovoked nature of the kidnapping and murder; (3) defendant's character (including the fact that defendant had a long history of assaultive behavior, that he had been incarcerated for five years and had committed the instant offense only two months after his release from prison); (4) the large number of misconduct tickets defendant received while incarcerated; (5) defendant's poor attitude while incarcerated; and (6) defendant's minimal potential for rehabilitation.

In *People v Houston,* 448 Mich 312, 320; 532 NW2d 508 (1995), our Supreme Court indicated that "[u]nder *Milbourn* the 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether [a sentence] reflects the seriousness of the matter." The *Houston* Court, in affirming a sentencing court's upward departure based on factors otherwise accounted for in the offense variables, explained that "*Milbourn* did not state or establish that any factors accounted for in the guidelines had been adequately considered or appropriately weighed." *Id.* Where a defendant's actions are so egregious that standard guidelines scoring methods simply fail to reflect their severity, an upward departure from the guidelines range may be warranted. *Houston, supra.* See also *People v Granderson,* 212 Mich App 673, 680; 538 NW2d 471 (1995).

After having reviewed the record, we conclude that the upward departure was not violative of *Milbourn* in light of the circumstances surrounding this offense and offender. *Houston, supra; Milbourn, supra.*

VII.

Next, defendant claims that because of the extensive pretrial publicity, the trial court should have granted his motion for a change of venue. We disagree. The existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Passeno,* 195 Mich App 91, 98; 489 NW2d 152 (1992); *People v Furman,* 158 Mich App 302, 321; 404 NW2d 246 (1987). Rather, to be entitled to a change of venue, the defendant must show that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it, or that the jury was actually prejudiced or that the atmosphere surrounding the trial was such as would create a probability of prejudice. *Passeno, supra; People v Wytcherly,* 172 Mich App 213, 220; 431 NW2d 463 (1988).

After reviewing the record, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a change of venue. *Passeno, supra.* As in *Passeno,* defendant "failed to show that there was a pattern of strong community feeling against him, sufficiently strong to render all potential jurors partial, or that the jury was actually prejudiced." Moreover, defendant has failed to show that an atmosphere existed which created a probability of prejudice. *Id.* Of the jurors who were ultimately impaneled to decide the case, only one juror admitted to having an opinion as to defendant's guilt or innocence, and she swore to disregard it. The rest of the jurors who decided the case indicated that while they had seen, heard or read media coverage about the case they had not formed an opinion as to defendant's guilt or innocence, and that they could render a fair and impartial verdict. Hence, defendant's jury was competent to hear the evidence. *Id.*

For the foregoing reasons, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a change of venue. Defendant's claim that the trial court erred in failing to sequester the jury is abandoned because he has failed to cite any authority to support his position. See *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

VIII.

Lastly, concerning defendant's claims of prosecutorial misconduct, we find no instance where the alleged misconduct resulted in defendant being denied a fair trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Robert P. Young, Jr.

[1] Don Crickon is defendant's uncle.

[2] Menzo was not home that evening.

[3] No one inside the McCracken home saw or heard anything suspicious and the police found no sign of forced entry.

[4] Defendant drove a 1974 Chevrolet van, painted with gray primer. The van had double rear doors, one with a window, and a sliding cargo door on the passenger side. There were small porthole windows near the rear on both sides of the van. The passenger side headlight was not working. There was a lot of rust on the front driver's side of the van, the muffler had ruptured, and the van was cluttered with junk and scrap materials including a dropcloth, plywood, boards, bottles and cans.

[5] Sliwa testified that he had seen the van numerous times since he moved into his house in June of 1991. He also claimed to have seen defendant walk by many times since June of 1991 and indicated that they had exchanged greetings and that defendant seemed friendly. When Sliwa was told that defendant had been incarcerated until March of 1992, Sliwa said, "[t]hen it was somebody that looked an awful hell of a lot like him."

[6] Sherman's parents' house is across the street from the alley which is the rear entrance to the Hitching Post Bar's parking lot.

[7] The two officers who interviewed Sherman testified that, when they spoke to her, she was unable to specifically describe or identify the driver, except to say that he was a white male with long hair. Police reports also indicated that Sherman could not specifically describe defendant or the van. Sherman admitted that police showed her pictures of the van. She also believed she might have been shown a Polaroid photo of defendant, and others, but acknowledged that she was unable to identify him. Sherman also admitted to watching television and reading newspaper coverage of this case prior to testifying, both of which included pictures of defendant and his van. However, she testified that she had

given the officers a good description of defendant and his van and that she had told them that she could identify the driver of the van if she saw him again.

[8] Zander spoke to police on May 14 and 17, 1992. At trial, he acknowledged that on both occasions he told police that he could not describe or identify the driver. Zander admitted that, after repeatedly seeing pictures of defendant and his van on television, he became convinced that it was defendant who had almost hit him.

[9] Due to the size of the samples, however, the blood type could not be determined.

[10] Defendant argued below that the body had been left where it was found sometime after defendant was arrested, and introduced evidence that the area had been unsuccessfully searched and that people who worked in the area had not noticed any foul smells or unusual insect activity. However, there was also evidence that some people in the area noticed a foul smell and an increase in the number of insects. Further, tall weeds were found growing through and around the bin, as through it had not been moved for awhile.

[11] Defendant's blood type was O, PGM 2+.

[12] Deanna had never been fingerprinted and her remains could not be fingerprinted. Efforts to lift her fingerprints from her personal items were unsuccessful. Therefore, evidence technicians chemically developed latent prints in 100 sheets of homework papers retrieved from her room. These prints were then compared to the ones found on the porthole window after eliminating prints made by Deanna's relatives, teachers and friends. On seventeen of the 100 papers, there were 32 prints that matched those on the porthole window. Therefore, the technicians concluded that the prints on the window were probably Deanna's, although the donor of the prints could not be positively and conclusively identified. Although defendant theorized that Deanna may have been in his van without his knowledge while playing with the McCracken girls, there was no specific testimony placing Deanna inside defendant's van at any time prior to the incident in question.

[13] For instance, Deborah Frazier testified that she was over at her mother's house, which is approximately one mile from the McCracken residence, on the night of the incident in question. At approximately 3:00 a.m., Deborah heard a female voice screaming. She then heard another female voice yell "stop, you're going to kill her" and then the screaming stopped. The disturbance came from a house two doors down from Deborah's mother's house. Robert Frazier, Deborah's father, testified that one of the men that lived in that house bore a striking resemblance to defendant. Further, the residents of this house owned an older model gray primer van. Donald Tompkins, another neighbor, confirmed those elements of Robert Frazier's testimony.

[14] We note that the Michigan Supreme Court has granted leave to appeal in *People v Joseph Lemmon* (lv gtd November 6, 1996, S Ct Docket No. 105850), a "thirteenth juror" case, to review the *Herbert* principle.

[15] Although defendant was charged with first-degree felony murder, he was ultimately convicted of second-degree murder.